



7565-01-P

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Parts 502 and 559

RIN 3141-AA48

Facility License Notifications and Submissions

AGENCY: National Indian Gaming Commission.

ACTION: Final rule.

SUMMARY: The National Indian Gaming Commission (NIGC or Commission) is amending its facility license regulations. The final rule amends the current regulations: to provide for an expedited review to confirm a tribe's submittal of facility license information; to require notice to the NIGC when a tribe issues, renews, or terminates a facility license; to streamline the submittal of certain information relating to the construction, maintenance, and operation of a gaming facility; and to provide that a tribe need not submit a notification of seasonal or temporary closures of less than 180 days.

DATES: The effective date of these regulations is [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background

The Indian Gaming Regulatory Act (IGRA or Act), Public Law 100-497, 25 U.S.C. 2701, et seq., was signed into law on October 17, 1988. The Act established the Commission and set out a comprehensive framework for the regulation of gaming on Indian lands.

The Act provides for tribal gaming on Indian lands within such tribe's jurisdiction. 25 U.S.C. 2710. The Act requires "a separate license issued by the Indian tribe . . . for each place, facility, or location on Indian lands at which Class II (and Class III) gaming is conducted." 25 U.S.C. 2710(b)(1) and (d)(1)(A)(iii). The Act also requires that tribal ordinances provide that "the construction and maintenance of the gaming facilities, and the operation of that gaming is conducted in a manner which adequately protects the environment and public health and safety." 25 U.S.C. 2710(b)(2)(E).

Part 559 of the NIGC's regulations serves three purposes. The first is for the Commission to receive information from tribes regarding the Indian lands status of each gaming facility. The second is for the Commission to obtain information from tribal governments regarding the construction, maintenance, and operation of the gaming facilities. Finally, part 559 serves to inform the Commission of those places, facilities, or locations at which Indian gaming is presently being conducted.

II. Previous Rulemaking Activity

On November 18, 2010, the Commission issued a Notice of Inquiry and Notice of Consultation advising the public that the NIGC was conducting a comprehensive review of its regulations and requesting public comment on which of its regulations were most in need of revision, in what order the Commission should review its regulations, and the process that the Commission should utilize to make revisions. 75 FR 70680, Nov. 18,

2010. On April 4, 2011, after holding eight consultations and reviewing all comments, the Commission published a Notice of Regulatory Review Schedule (NRRS) setting forth a consultation schedule and process for review. 76 FR 18457, April 4, 2011. Part 559 was included in the first regulatory group reviewed pursuant to the NRRS.

The Commission conducted multiple tribal consultations as part of its review of part 559. Tribal consultations were held in every region of the country and attended by tribal leaders or their representatives. In addition to tribal consultations, on June 11, 2011, the Commission requested public comment on a preliminary draft of amendments to part 559. After considering all public comments, the Commission published a Notice of Proposed Rulemaking. 77 FR 4731, Jan. 31, 2012.

III. Review of Public Comments

In response to its Notice of Proposed Rulemaking, published January 31, 2012, the Commission received the following comments:

559.1 What is the scope and purpose of this part?

Comment: Commenters stated generally that the prior versions of the facility license rules are troublesome and that the proposed amendments to the rules alleviate much of that concern.

Response: The Commission agrees.

559.2 When must a tribe notify the Chair that it is considering issuing a new facility license?

Comment: A few commenters questioned the need for a 120-day notification period prior to the opening of a new gaming facility, considering that a tribe is not legally required to receive an Indian lands determination before gaming on the land. Two

commenters stated that, while the Commission has clarified that gaming tribes could open a facility prior to the expiration of the 120-day period, many tribes view this as a de facto required waiting period. Thus, the commenters stated that the 120-day period seems unreasonably long, and that a shorter notification period is more reasonable and appropriate. Two commenters stated further that even a 60-day expedited review period seems altogether unnecessary for such a limited review. Thus, one commenter suggested a notice period of 30 days, another commenter suggested a notice period of 15-30 days, and the third commenter suggested an unspecified shorter notice period. If the Commission does not amend the rule to a shorter notice period, one commenter suggested that the Commission grant waivers of the 120-day period for reasonable cause shown.

Response: The Commission does not believe that providing a shorter notification period is appropriate. Commenters are correct that there is no legal requirement that the Commission issue a formal determination (also known as an Indian lands determination) prior to a tribe gaming on a specific site. However, the rule does require a tribe to wait 120 days after notification before opening a new facility, unless the tribe has requested an expedited review, pursuant to which the Chair may grant a waiver of the 120-day notification period. The Commission notes that the notification requirement does not involve an approval or disapproval action by the Chair or the Commission. If a tribe opens a facility on lands not eligible for gaming, it does so at the risk of violating IGRA and other applicable laws.

Lastly, the Office of Inspector General, U.S. Department of the Interior, recommended in a September 2005 report that the Commission establish a process by which tribes that have taken land into trust since October 1988 certify the land's status,

and that the Commission establish and maintain a database containing eligibility information for all Indian gaming operations. Therefore, although the Commission does not issue an Indian lands determination for every facility, the Commission reviews Indian lands information to ensure compliance with IGRA.

Comment: A few commenters noted that, although the Commission has stated that an Indian lands determination is not required prior to opening a new gaming facility, tribes that wish to have a lands determination need to be assured that the submission of the facility license notification will trigger the Commission to act, as these tribes will likely amend their gaming ordinances to be site-specific that would then require the Chair to approve or disapprove the ordinance amendment within 90 days. Therefore, the commenters suggested that the rule be modified to permit the tribes to request an Indian lands determination, or at the very least, to amend the notification period from 120 days to 90 days.

Response: The Commission declines to make the requested changes, because the notification requirement does not involve an approval or disapproval action by the Chair or the Commission. Although it is true that an ordinance amendment must be approved or disapproved within 90 days of submission, in practice, tribes often withdraw and then re-submit the site-specific ordinance to provide for a longer period of review. In addition, under the final rule, tribes can now request an expedited 60-day review of a facility license notification.

Comment: A commenter requested clarification regarding whether a tribe can begin construction of a new facility more quickly if the tribe requests an expedited review.

Response: The notification requirement does not provide for approval or disapproval by the Chair. The notification does not grant or deny permission to a tribe to begin construction on a new gaming facility.

Comment: In order for tribes to feel more comfortable with moving ahead with construction of a new gaming facility, one commenter suggested that the Commission automatically send tribes a standard letter stating that the Commission has received and reviewed the facility license notification and the Indian lands information and that the Commission has no objections to the information submitted.

Response: The Commission chose not to incorporate the commenter's suggested amendment. The preliminary discussion draft issued for comment on June 11, 2011 originally provided for the Commission to quickly review the status of the Indian lands where Class II or Class III gaming was to occur and to notify the tribes once the Commission had completed these reviews. However, many commenters objected, stating that the draft created a new process committing the Chair to act while tribes waited for the Chair's action. In objecting to this change, the tribes noted that there is no legal requirement for an Indian lands determination prior to gaming on that land, and that the notification process does not require the Commission to verify the Indian lands status within the 120-day timeframe.

559.3 When must a tribe submit a copy of a newly issued or renewed facility license to the Chair?

Comment: One commenter was very supportive of the removal of the three-year facility license renewal requirement, as it recognizes the role of tribes as the primary regulators of their gaming facilities.

Response: The Commission agrees and has retained this provision in the final rule.

559.4 What must a tribe submit to the Chair with the copy of each facility license that has been issued or renewed?

Comment: Several commenters stated that they are pleased and strongly support the rule changes to § 559.4, which eliminates duplicative and burdensome environmental and public health and safety (EPHS) reporting requirements (previously found in 25 CFR 502.22) in favor of an attestation by the tribe. Two commenters stated specifically that they support the incorporation of § 502.22 into § 559.4, thereby removing § 502.22. One commenter noted that the NIGC, as a federal regulatory body, is primarily responsible for the regulatory oversight of Indian gaming, while other Federal agencies are responsible for EPHS issues.

Response: The Commission agrees and has retained these provisions in the final rule.

Comment: One commenter requested clarification regarding whether the EPHS attestation should come from the tribe or from its counsel.

Response: The Commission expects that the attestation will come from a designated official or regulatory body authorized by the tribal government to attest to the EPHS determinations.

Comment: A commenter requested clarification regarding whether a tribe must submit an EPHS attestation with every license renewal, even if there has been no new construction at the specific gaming facility.

Response: An EPHS attestation must be submitted with every license renewal, as the rule requires a tribe to not only attest that the construction of the gaming facility is conducted in a manner which adequately protects the environment and public health and safety, but also that the ongoing maintenance and operation of the gaming facility is conducted in a manner which adequately protects the environment and public health and safety.

Comment: One commenter requested clarification regarding whether tribes must still have a list of the environmental, public health, and safety laws and regulations to be available to the Commission upon request, even though tribes no longer have to automatically submit the list with the EPHS certification.

Response: Tribes should have such documentation available to be provided to the Commission upon request.

559.5 Does a tribe need to notify the Chair if a facility license is terminated or expires or if a gaming place, facility, or location closes or reopens?

Comment: Some commenters stated that they are pleased with the proposed notice exemption for temporary or seasonal closures not exceeding 180 days, as it will help reduce administrative burdens for tribal governments.

Response: The Commission agrees and has retained this provision in the final rule.

Comment: Some commenters suggested that the rule should be amended further to allow for an exemption from the notification requirement for temporary gaming facilities that are opened for estimated periods of less than 12 months. The commenters stated that such an exemption is necessary following a natural disaster or other

unforeseeable event that leads to a forced closure of a permanent gaming facility, because the opening of a temporary facility may be necessary to secure critical revenues and guarantee continued funding of governmental programs and services until the permanent facility is fully rehabilitated for opening.

Response: The Commission declines to amend the rule as suggested by the commenters. Notifications to the Commission of new gaming facility openings, whether permanent or temporary, are necessary so that the Commission has accurate, up-to-date records of the Indian gaming facilities operating on Indian lands in order for the Commission to be able to perform its statutory responsibilities.

Comment: A few commenters recommended that the NIGC include an exemption for temporary gaming facility openings that is similar to the exemption for temporary closures.

Response: The Commission declines to adopt the suggested changes. Notifications to the Commission of new gaming facility openings, whether permanent or temporary, are necessary so that the Commission has accurate, up-to-date records of the Indian gaming facilities operating on Indian lands in order for the Commission to perform its statutory responsibilities.

Comment: A few commenters suggested that the rule should be amended to exempt tribal gaming regulatory authorities that issue temporary facility licenses from the Commission's notification requirements, stating that such an amendment would be consistent with tribal sovereignty and self-governance. The commenters further stated that, in light of the time-sensitive nature of opening and operating a temporary gaming facility, such an amendment would minimize disruptions and revenue losses as a result of

a forced closure. Otherwise, tribes will be required to wait 30 days for temporary facility openings (as the rule suggests that the opening must be delayed pending the end of the notice period).

Response: The Commission declines to amend the rule as suggested by the commenters. Notifications to the Commission of new gaming facility openings, whether permanent or temporary, are necessary so that the Commission has accurate, up-to-date records of Indian gaming facilities operating on Indian lands in order for the Commission to be able to perform its statutory responsibilities. The notice period is 120 days for both new and temporary facilities.

559.6 May the Chair require a tribe to submit applicable and available Indian lands or environmental and public health and safety documentation regarding any gaming place, facility, or location where gaming will occur?

Comment: Some commenters suggested that minimum reasonableness standards are needed to govern agency discretion and to minimize the risk of arbitrary and capricious decision-making. One commenter noted that, although the Commission has explained that it decided against an amendment to this proposed rule because “it is not possible to identify every possible scenario under which the Chair would exercise” his or her discretion to request additional Indian lands or EPHS documentation from a tribe, minimum standards would provide greater predictability and consistency with respect to Commission actions and other benefits.

Response: The Commission disagrees, because it is not possible to identify every possible scenario under which the Chair would exercise this discretion.

Regulatory Matters

Regulatory Flexibility Act

The rule will not have a significant impact on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. Moreover, Indian tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

The rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. 804(2). This rule does not have an annual effect on the economy of \$100 million or more. This rule will not cause a major increase in costs or prices for consumers, individual industries, federal, state or local government agencies or geographic regions and does not have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandate Reform Act

The Commission, as an independent regulatory agency, is exempt from compliance with the Unfunded Mandates Reform Act. 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

Takings

In accordance with Executive Order 12630, the Commission has determined that the rule does not have significant takings implications. A takings implication assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Commission has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

National Environmental Policy Act

The Commission has determined that the rule does not constitute a major federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321, et seq.

Paperwork Reduction Act

The information collection requirements contained in this rule were previously approved by the Office of Management and Budget (OMB) as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, et seq.) and assigned OMB Control Number 3141-0012, which expired on January 31, 2011. The Commission is in the process of reinstating that Control Number. The rule will reduce the burden hours of the information collection under the Paperwork Reduction Act of 1995 by eliminating: (i) the Commission-imposed 3-year facility license renewal requirement, although tribes will still have to submit a copy of each renewed facility license should they choose to institute their own facility license renewal periods; (ii) the requirement that tribes submit a document listing all non-federal environmental and/or public health and safety laws, resolutions, codes, policies, standards, or procedures, and must now only submit an attestation certifying that by issuing the facility license, the tribe has determined that the construction, maintenance, and operation of the gaming facility is being conducted in a manner that adequately protects the environment and the public health and safety; and

(iii) the requirement that tribes provide notifications of seasonal closures or temporary closures with a duration of less than 180 days.

List of Subjects

25 CFR Part 502

Gambling, Indians – lands.

25 CFR Part 559

Gambling, Indians – lands, Indians – Tribal Government, Notification and submission requirements – facility licenses.

For the reasons set forth in the preamble, the Commission amends its regulations at 25 CFR parts 502 and 559 to read as follows:

PART 502—DEFINITIONS OF THIS CHAPTER

1. The authority citation for part 502 is revised to read as follows:

Authority: 25 U.S.C. 2701 *et seq.*

§ 502.22 [Removed]

2. Section 502.22 is removed.

3. Part 559 is revised to read as follows:

PART 559--FACILITY LICENSE NOTIFICATIONS AND SUBMISSIONS

Sec.

559.1 What is the scope and purpose of this part?

559.2 When must a tribe notify the Chair that it is considering issuing a new facility license?

559.3 When must a tribe submit a copy of a newly issued or renewed facility license to the Chair?

559.4 What must a tribe submit to the Chair with the copy of each facility license that has been issued or renewed?

559.5 Does a tribe need to notify the Chair if a facility license is terminated or expires or if a gaming place, facility, or location closes or reopens?

559.6 May the Chair require a tribe to submit applicable and available Indian lands or environmental and public health and safety documentation regarding any gaming place, facility, or location where gaming will occur?

559.7 May a tribe submit documents required by this part electronically?

Authority: 25 U.S.C. 2701, 2702(3), 2703(4), 2705, 2706(b)(10), 2710, 2719.

§ 559.1 What is the scope and purpose of this part?

(a) The purpose of this part is to ensure that each place, facility, or location where class II or III gaming will occur is located on Indian lands eligible for gaming and obtain an attestation certifying that the construction and maintenance of the gaming facility, and the operation of that gaming, is conducted in a manner that adequately protects the environment and the public health and safety, pursuant to the Indian Gaming Regulatory Act.

(b) Each gaming place, facility, or location conducting class II or III gaming pursuant to the Indian Gaming Regulatory Act or on which a tribe intends to conduct class II or III gaming pursuant to the Indian Gaming Regulatory Act is subject to the requirements of this part.

§ 559.2 When must a tribe notify the Chair that it is considering issuing a new facility license?

(a) A tribe shall submit to the Chair a notice that a facility license is under consideration for issuance at least 120 days before opening any new place, facility, or location on Indian lands where class II or III gaming will occur.

(1) A tribe may request an expedited review of 60 days and the Chair shall respond to the tribe's request, either granting or denying the expedited review, within 30 days.

(2) Although not necessary, a tribe may request written confirmation from the Chair.

(b) The notice shall contain the following:

(1) The name and address of the property;

(2) A legal description of the property;

(3) The tract number for the property as assigned by the Bureau of Indian Affairs, Land Title and Records Offices, if any;

(4) If not maintained by the Bureau of Indian Affairs, Department of the Interior, a copy of the trust or other deed(s) to the property or an explanation as to why such documentation does not exist; and

(5) If not maintained by the Bureau of Indian Affairs, Department of the Interior, documentation of the property's ownership.

(c) A tribe does not need to submit to the Chair a notice that a facility license is under consideration for issuance for occasional charitable events lasting not more than one week.

§ 559.3 When must a tribe submit a copy of a newly issued or renewed facility license to the Chair?

A tribe must submit to the Chair a copy of each newly issued or renewed facility license within 30 days of issuance.

§ 559.4 What must a tribe submit to the Chair with the copy of each facility license that has been issued or renewed?

A tribe shall submit to the Chair with each facility license an attestation certifying that by issuing the facility license, the tribe has determined that the construction and maintenance of the gaming facility, and the operation of that gaming, is conducted in a manner which adequately protects the environment and the public health and safety. This means that a tribe has identified and enforces laws, resolutions, codes, policies, standards or procedures applicable to each gaming place, facility, or location that protect the environment and the public health and safety, including standards under a tribal-state compact or Secretarial procedures.

§ 559.5 Does a tribe need to notify the Chair if a facility license is terminated or expires or if a gaming place, facility, or location closes or reopens?

A tribe must notify the Chair within 30 days if a facility license is terminated or expires or if a gaming place, facility, or location closes or reopens. A tribe need not provide a notification of seasonal closures or temporary closures with a duration of less than 180 days.

§ 559.6 May the Chair require a tribe to submit applicable and available Indian lands or environmental and public health and safety documentation regarding any gaming place, facility, or location where gaming will occur?

A tribe shall provide applicable and available Indian lands or environmental and public health and safety documentation requested by the Chair.

§ 559.7 May a tribe submit documents required by this part electronically?

Yes. Tribes wishing to submit documents electronically should contact the Commission for guidance on acceptable document formats and means of transmission.

DATED: September __14__, 2012, Washington, D.C.

Tracie L. Stevens,
Chairwoman

Steffani A. Cochran,
Vice-Chairwoman

Daniel J. Little,
Associate Commissioner

